MEGAT NAJMUDDIN DATO' SERI (DR) MEGAT KHAS *a*

v.

BANK BUMIPUTRA MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR *b*
SHAIK DAUD ISMAIL JCA
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
[CIVIL APPEAL NO: W02-753-1998]
25 NOVEMBER 2000 *c*

CIVIL PROCEDURE: *Appeal - Memorandum and record of appeal - Sealed copy of order not included - Whether sealed copy may be tendered at hearing of appeal - Whether leave of court necessary - Rules of the Court of Appeal 1994, r. 18(4) & (7)*

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The respondent (plaintiff bank) filed an action against the appellant who had stood as guarantor for an overdraft facility of RM500,000 granted to the borrower. The appellant filed his defence and also an application to strike out the respondent's writ and statement of claim. The application to strike out was granted. The respondent subsequently filed two applications, namely an application to set aside the order allowing the application to strike out and an application to amend a summons-in-chambers. The court allowed both applications and the appellant appealed. *e*

The record of appeal was filed within time but did not include the sealed copy of the relevant order. Counsel for the respondent therefore raised the preliminary objection that the appellant had not obtained leave to include in the record of appeal the sealed copy of the said court order. *f*

The issue for consideration therefore was whether the instant appeal was properly before the court. Counsel for the appellant, relying on Practice Direction No 1 of 1992, argued that for the purpose of tendering the sealed copy of the court order, it would suffice if the appellant were to tender the sealed copy of the said order in time before the hearing of the appeal. *g*

Held:
Per Mohd Saari Yusoff JCA *h*

[1] According to r. 18(4) & (7) of the Rules of the Court of Appeal 1994, the appellant shall attach to such memorandum copies of the proceedings in the High Court, including a copy of the order appealed from, and the memorandum and copies referred to shall be filed at the registry within six weeks after the entry of the appeal or within such further time as the court may allow. *i*

[2] Nowhere is it stated in Practice Direction No 1 of 1992 that if this is not done in time, the order may be filed without the leave of the court. The onus was on the appellant to show that the supplementary record of appeal was filed soon after he received the sealed copy of the order. Therefore, whatever supplementary record of appeal to be filed pursuant to Practice Direction No 1 of 1992 must be done within the stipulated time; otherwise leave of court must be obtained. Failure on the part of the appellant to apply for leave to file out of time was fatal.

[Appeal struck off with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah memfailkan satu tindakan terhadap perayu yang menjadi penggerenti bagi satu kemudahan sebanyak RM500,000 yang telah diluluskan kepada peminjam. Perayu telah memfailkan pembelaannya dan juga satu permohonan untuk membatalkan writ dan pernyataan tuntutan responden. Permohonan untuk membatalkan telah diberikan. Responden kemudiannya memfailkan dua permohonan, iaitu satu permohonan untuk mengenepikan perintah yang membenarkan permohonan untuk membatalkan dan satu permohonan untuk meminda satu saman dalam kamar. Mahkamah telah membenarkan kedua-dua permohonan dan perayu kini merayu.

Rekod rayuan perayu telah difailkan di dalam tempoh yang ditetapkan tetapi tidak memasukkan salinan perintah yang relevan. Peguam bagi pihak responden dengan itu telah membangkitkan bantahan awal bahawa perayu tidak memperolehi kebenaran untuk memasukkan dalam rekod rayuan salinan perintah mahkamah tersebut.

Isu untuk pertimbangan adalah samada rayuan perayu adalah sempurna di hadapan mahkamah. Peguam bagi pihak perayu yang bergantung pada Arahan Amalan No 1 Tahun 1992 berhujah bahawa bagi tujuan mengemukakan perintah mahkamah tersebut, ianya adalah memadai jika perayu mengemukakan perintah mahkamah tersebut waktu sebelum perbicaraan rayuan.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Menurut k. 18(4) & (7) Kaedah-kaedah Mahkamah Rayuan 1994, perayu seharusnya melampirkan kepada memorandum yang sedemikian salinan-salinan prosiding di dalam Mahkamah Tinggi, termasuk sesalinan dari perintah yang dirayui dan memorandum serta salinan-salinan yang dirujuk hendaklah difailkan di pejabat pendaftaran dalam tempoh enam minggu selepas kemasukkan rayuan atau di dalam tempoh sedemikian yang selanjutnya sepertimana yang mungkin dibenarkan oleh mahkamah.

[2] Arahan Amalan No 1 Tahun 1992 tidak menyatakan bahawa jika ianya tidak dilakukan dalam masa yang ditetapkan, ianya boleh difailkan tanpa kebenaran mahkamah. Bebanan adalah terletak pada perayu untuk menunjukkan bahawa rekod rayuan tambahan telah difailkan sejurus selepas ianya menerima salinan perintah tersebut. Oleh itu apa pun rekod rayuan tambahan yang harus difailkan mesti dilakukan dalam tempoh masa yang ditetapkan, atau sebaliknya kebenaran mahkamah mestilah diperolehi. Kegagalan perayu untuk memohon kebenaran bagi memfailkan di luar masa adalah memudaratkan.

[Rayuan dibatalkan dengan kos.]

Case(s) referred to:
Capital Insurance Bhd v. Kassim Mohd Ali [2000] 1 CLJ 269 ***(foll)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 18(4), (7)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c)

Other source(s) referred to:
Practice Direction No 1 of 1992

For the appellant - Teh Meng Teck (Richard WG Lee, Tina Cheah with him); M/s Cheah Teh & Su
For the respondent - Azhar Arman Ali (Md Yunos Shariff with him); M/s Wan Marican, Hamzah & Shaik

[Appeal from High Court, Kuala Lumpur; Suit No: D2-22-1117-92]

Reported by Mariette Peters-Goh

JUDGMENT

Mohd Saari Yusoff JCA:

In this appeal, the 1st defendant (hereinafter referred to as "the appellant") is dissatisfied with the order of the High Court granted on 20 October 1998.

Factual Background

The respondent filed this action against the appellant who stood as a guarantor of an overdraft facility for RM500,000 granted to one Wira Kris Agricultural Services Sdn Bhd ("the borrower'). The appellant filed his defence and also filed summons in chambers (SIC) for an order under O. 18 r. 19(1)(b) and (c) RHC 1980 to strike out the respondent's writ and statement of claim.

SIC was part-heard but on the date of its continued hearing on 17 September 1994, the respondent's counsel was absent. The court proceeded with the hearing and granted the application to strike out the respondent's writ and statement of claim.

Subsequently, the respondent filed two applications:

(i) an application to set aside the order granted on 17 September 1994.

(ii) an application to amend SIC (encl. 16).

On 20 October 1998, the court allowed both the applications. Against that order, the appellant appeals to this court.

It is not in dispute that the main appeal record was filed within time, which appeal record did not include sealed copy of the order granted on 20 October 1998. From the last date of filing the appeal record to this date (20 September 2000), there is a lapse of about 1 1/2 years.

The learned counsel for the respondent raised a preliminary objection on the ground that the appellant had not obtained leave to include in the appeal record the sealed copy of the court order granted on 20 October 1998.

Issue

Issue for determination is whether the appeal is properly before the court.

Finding

In this regard, it is pertinent to refer to the relevant statutory provisions. For ease of reference, r. 18(4) and (7) of the Rules of the Court of Appeal 1994 are reproduced below:

18 Memorandum of appeal

(1) ...

(2) ...

(3) ...

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including –

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal:

(b) a copy of the judge's note of the hearing of the cause or matter in which the decision appealed against was given;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the Court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and

(f) a copy of the notice of appeal.

(5) ...

(6) ...

(7) The memorandum and copies above referred to which, together shall be called the record of appeal, shall be filed at the Registry within six weeks after the entry of the appeal or within such further time as the Court may allow.

(8) ...

(9) ...

(10) ...

For the appellant, En. Teh Meng Teck argued that for purpose of tendering the sealed copy of the court order, it would suffice if the appellant were to tender the sealed copy of the court order at any time before the hearing of this appeal, as here. The learned counsel relied on Practice Direction No. 1 of 1992.

On the requirement to comply with the aforesaid statutory provisions, in *Capital Insurance Bhd v. Kassim bin Mohd Ali* [2000] 1 CLJ 269 at p. 276, Mokhtar Sidin JCA said:

> Is clear to us that the Practice Direction allowed an appellant to file without leave a sealed copy of the order not received with the notes of the evidence and the judgment in a separate bundle which is called the supplementary appeal record when the order was not received in time and it must be done as soon as the appellant received the sealed copy of that order. Nowhere is it stated in the Practice Direction that if it is not done in time (reasonable time after receiving the sealed copy of the order) that it could be filed without leave of the court. The onus is on the appellant to show that the supplementary appeal record was filed soon after it received the sealed copy of the order. Rule 18(7) makes it clear that all filing of documents must be done within the stipulated time. It is imperative to us that an appellant is not allowed to file the

a supplementary appeal record at any time it likes just because of the Practice Direction. **In our view whatever supplementary appeal record to be filed pursuant to that Practice Direction, it must be done within the stipulated time otherwise leave of the court must be obtained**. In this appeal the appellant has not satisfied us that the supplementary appeal record was filed in time. In our opinion the failure on the part of the appellant to apply for b leave to file out of time is fatal. (emphasis added)

On the facts of the instant case, as the appellant had failed to obtain leave to file supplementary record of appeal out of time, we upheld the preliminary objection by the respondent. Consequently, we held that there was no proper c appeal record before us to consider. This appeal was struck off with costs. Deposit to respondent towards account of taxed costs.

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